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In the Supreme Court of the United States

OCTOBER TERM, 1976

CARL W. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The opinion of the district court (Pet. App. 18a-21a) is reported at 399 F. Supp. 982.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1976. A petition for rehearing was denied on April 7, 1976. The petition for a writ of certiorari was filed on May 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy offense of which petitioner was convicted is punishable by imprisonment.

2. Whether the indictment properly alleged a conspiracy to violate 15 U.S.C. 78q(a) and 78ff(a).

3. Whether the delay prior to indictment amounted to a denial of due process.

4. Whether the prosecution was obliged to present to the grand jury evidence allegedly contradicting the testimony of another grand jury witness.

5. Whether there was sufficient evidence to support petitioner's conviction for conspiring to make false statements in a report filed with the Securities and Exchange Commission.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to file with the Securities and Exchange Commission an "X-17A-5" questionnaire falsely listing the accounts of the Orvis Brothers brokerage firm and its customers and falsely stating that an improper hypothecation of fully paid customers' securities had been corrected.[1] He was sentenced to imprisonment for one year and one day. The court of appeals affirmed (Pet. App. 1a-17a).

While petitioner was a general partner in the Wall Street brokerage firm of Orvis Brothers[2] and during his tenure as chairman of its executive committee, petitioner conspired with fellow partners Fergus M. Sloan, Donald Eucker, Thomas C. Kilduff, and others to conceal the weakened financial condition of the firm and thereby to

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[1]The indictment charged Donald Eucker, Fergus M. Sloan, John J. Villani, and Thomas Kilduff with conspiring with petitioner to file false statements with the Commission. Eucker and Sloan pleaded guilty. Kilduff pleaded guilty and testified for the government at petitioner's trial. The jury acquitted Villani.

[2]Petitioner had invested over $1,000,000 in the firm (Tr. 14, 107-108, 141, 1516).

keep the firm operating long after it lacked the necessary capital to do so. Under Rule 325 of the New York Stock Exchange, Orvis's liabilities could not exceed twenty times its capital. For a violation of the Rule, the Exchange could have ordered Orvis to cease doing business or could have placed restrictions on its operations (Tr. 151). Petitioner and his co-conspirators sought to avoid these sanctions by filing a false financial report with the Commission. In June 1970, Orvis Brothers was nevertheless unable to stay in business; it closed its doors, leaving debts in excess of four million dollars.

The evidence showed that Orvis was experiencing financial difficulties in the fall of 1968 and 1969 and needed to raise additional capital (Tr. 149). During a March 1969 executive committee meeting (which petitioner and Eucker attended), Sloan, the managing partner, told Kilduff, who was in charge of finance accounting, to add $797,100—due as commissions but yet unpaid—to the firm's profit and loss statement and to place 4,000 shares of Clinton Oil in the firm's trading account without posting their cost. Petitioner did not object to these measures, which inflated the firm's capital (Tr. 190-191, 267-268).

At another meeting in April 1969, Kilduff mentioned his attempt to "prop up" the firm's capital by fraudulent bookkeeping, and advised the partners that the firm's untampered capital ratio was 30 to 1 (Tr. 208). Petitioner and Sloan told Kilduff: "Just make sure we stay in business, we keep the doors open" (Tr. 209). At an August 1969 executive committee meeting, Kilduff told petitioner and the other partners that another 5,000 shares of Clinton Oil were listed as firm capital without the posting of their cost and that four bad debt accounts were posted as cash accounts although they should have been charged against the firm's capital (Tr. 289-290, 309-310).

In August 1969, Realto Clinton sent Lyndon Gamelson to Orvis in connection with Sloan's request that Clinton invest additional capital in the brokerage firm (Tr. 1160, 2190). Petitioner told Gamelson that there was no problem with the firm's capital ratio, reassured him in a "half-dozen ways," and returned to Gamelson stock that Gamelson had invested in the firm—telling him that Orvis did not need it (Tr. 1164, 1255).

Throughout 1969, Eucker—a member of the executive committee—instructed Orvis employees to hypothecate customers' securities for which the customers had fully paid (Tr. 1129, 1934).[3] Orvis used these securities, which it held for safekeeping, as collateral to secure bank loans; the proceeds of the loans were added to the firm's capital account (Tr. 1126-1128). Securities worth more than $5,960,000 were hypothecated (Tr. 1337-1338, 1392).

On October 15, 1969, petitioner attended a meeting at which the firm's auditors reviewed—question by question—the X-17A-5 report on Orvis's financial status. The auditors prepared the report from the figures in Orvis's books (Tr. 412, 1322-1324). The X-17A-5 report stated, among other things, that Orvis had pledged "in error" fully paid customers' securities, totaling in excess of $5,960,000, but that the situation had been "corrected" by substituting different securities that were not fully paid for (Tr. 1337-1338, 1392). Orvis filed the report with the SEC on October 16, 1969.

ARGUMENT

1. The conspiracy statute under which petitioner was convicted,' 18 U.S.C. 371, provides a maximum penalty

[3]Hypothecation is the giving of a security interest in property to a creditor without delivery of possession or transfer of title to the creditor. See *The Nestor*, 18 Fed. Cas. 9 (No. 10,126).

of five years' imprisonment or a fine of $10,000, or both; but if the object of the conspiracy is a misdemeanor, the penalty may not exceed the maximum penalty for that misdemeanor. Petitioner argues (Pet. 17-25) that the object of the conspiracy here was a misdemeanor for which no term of imprisonment was authorized and, accordingly, that his sentence of imprisonment for a year and a day was improper.

Petitioner's argument rests on the provision of 15 U.S.C. 78ff(a) that a term of imprisonment may not be imposed for violating an SEC rule or regulation of which the defendant had no knowledge. Claiming that he was convicted of conspiring to violate Rules 17a-3, 4, and 5, 17 C.F.R. 240.17a-3 to 240.17a-5 (requiring the filing of X-17A-5 questionnaires), rather than of conspiring to make false statements, in violation of 15 U.S.C. 78q(a) and 78ff(a), petitioner asserts: (1) that no term of imprisonment could properly have been imposed for the substantive offense because he lacked knowledge of the SEC rules, (2) that the substantive offense, punishable by a fine, was only a misdemeanor under 18 U.S.C. 1, and (3) that his conviction therefore subjected him only to a fine and not to a term of imprisonment.

The flaw in petitioner's argument is his premise that he was convicted of conspiring to violate the SEC rules rather than the statutory prohibitions. The object of the conspiracy, as charged in the indictment and proved at trial, was to submit false statements to the SEC and thereby to conceal Orvis's financial problems. SEC Rules 17a-3, 4, and 5 required the filing of the relevant X-17A-5 questionnaire and specified the information to be disclosed. But it was 15 U.S.C. 78ff—not the rules—that prohibited the making of false statements. As the court of appeals correctly stated (Pet. App. 11a-12a):

> The charge of wrongdoing submitted to the jury was not the failure to keep and preserve records and file reports as required by the rules; it was the making of false and misleading statements in a report, which conduct was specifically proscribed by §78ff(a). [Petitioner] is therefore not entitled to rely on the "no knowledge" portion of that statute. *United States* v. *Colasurdo, supra,* 453 F. 2d [585] at 594 [(C.A. 2)].

2. Petitioner asserts (Pet. 25-34) that the indictment did not properly charge a conspiracy to hypothecate customers' securities, in violation of SEC Rule 8c-1, 17 C.F.R. 240.8c-1, because it failed to allege that the amount hypothecated exceeded the aggregate indebtedness of all of Orvis's customers. But the indictment, as submitted to the jury, did not purport to charge an unlawful hypothecation. The district court did not submit to the jury Count 9, charging an hypothecation in violation of Rule 8c-1 (Tr. 983).[4] The only relevance of the hypothecation to the indictment as submitted to the jury was that the conspiracy count alleged that the X-17A-5 questionnaire falsely stated that Orvis Brothers had corrected an erroneous hypothecation of $5,960,000 worth of customers' fully paid securities (C.A. App. 25a).[5]

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[4]The court, before submitting the case to the jury, dismissed Count 9, charging petitioner and his co-defendants with an hypothecation in violation of 15 U.S.C. 78h and 78ff, 18 U.S.C. 2, and 17 C.F.R. 240.8c-1. The court stated that it was doing so to simplify the case and that the count might properly have been submitted to the jury (Tr. 982-983, 2310-2312).

[5]In Count 1 under the indictment's original format, a paragraph—not submitted to the jury—charged that an object of the conspiracy was the hypothecation of customers' securities (C.A. App. 10a, 24a-25a). ("C.A. App." refers to the appendix in the court of appeals).

The district court emphasized, in its final instructions to the jury, that the government did not contend that the defendants intended improperly to hypothecate customers' securities; rather, the court said, the issue was whether the defendants "misrepresented their efforts to correct the [erroneous hypothecation], thus contributing to the claimed falsity of the questionnaire" (Tr. 3040-3041). Thus, as the court of appeals correctly held (Pet. App. 10a):

> Whether, as [petitioner] now asserts, the Government failed to prove that the hypothecation was unlawful is beside the point; the SEC was entitled to truthful information. The wrongful act charged was the filing of the false report, not the hypothecation.

3. Petitioner's contention (Pet. 35-42) that he was denied due process because of pre-indictment delay was waived by his failure to raise the issue before trial. As the court of appeals stated, "[a] defendant cannot wait to see whether the verdict is to his liking before arguing that he was prejudiced by delay" (Pet. App. 10a). See Rule 12(b)(2), Fed. R. Crim. P.; *Estrella* v. *United States,* 429 F. 2d 397 (C.A. 9), certiorari denied, 400 U.S. 1011. In any event, petitioner was not denied due process by the filing of the indictment on September 10, 1974—charging a conspiracy beginning on September 1, 1968—since petitioner did not incur substantial, actual prejudice, nor did the government intend to gain a tactical advantage from the delay. *United States* v. *Marion,* 404 U.S. 307, 324.

Petitioner contends that the delay deprived him of the testimony of Robert Vesco, who in 1972 testified before the SEC in its investigation of the Orvis collapse. But petitioner does not allege—and the record does not show—that Vesco's testimony would have aided petitioner's defense. Petitioner also asserts that the delay made it

impossible to obtain alibi witnesses and that the memories of witnesses faded, but these generalized claims do not demonstrate that petitioner was denied a fair trial and do not justify dismissal of the indictment. *United States* v. *Marion, supra,* 404 U.S. at 326. As the court of appeals found, petitioner has "failed to show any contrived procrastination by the Government and [can] point to no prejudice established beyond mere conjecture" (Pet. App. 10a).

4. Petitioner argues (Pet. 36-38) that he was denied his "right to indictment" by the grand jury because the government did not call Peter Schmidt[6] before the grand jury. The government, however, is not obliged to call all available witnesses before the grand jury and need not present evidence tending to weaken its case. *United States* v. *Koska,* 443 F. 2d 1167, 1169 (C.A. 2), certiorari denied, 404 U.S. 852.[7] In any event, there is no reason to suppose that the grand jury would have been any more influenced by the testimony than was the petit jury at trial.

5. Petitioner contends (Pet. 42-43) that there was insufficient evidence to sustain his conviction for conspiring to make false statements in the X-17A-5 questionnaire filed with the SEC. That contention was correctly

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[6]Schmidt, Kilduff's attorney, testified at trial that Kilduff had told him that he acted alone in falsifying the firm's books and that his partners knew nothing about it (Tr. 2460).

[7]Petitioner's reliance (Pet. 37) on *Johnson* v. *Superior Court of San Joaquin County,* 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P. 2d 792, is misplaced. There, an indictment was dismissed because the grand jury was not given exculpatory evidence, in violation of a specific provision of the California Penal Code that requires a grand jury to hear such evidence. There is no comparable federal statute, nor has such a requirement been imposed by any federal court.

rejected by the court of appeals on the basis of its own thorough review of the evidence (Pet. App. 8a-9a). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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